STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2637

STATE OF WISCONSIN ex rel.
ANTJUAN REDMOND,

Petitioner-Appellant,

v.

BRIAN FOSTER, Warden,
Kettle Moraine Correctional
Institution,

Respondent-Respondent.

APPEAL FROM THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE L. EDWARD STENGEL, PRESIDING, CASE NO. 14-CV-0310

SUPPLEMENTAL BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT

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Petitioner-Appellant Antjuan Redmond appeals from an order denying his petition for writ of habeas corpus which asserted ineffective assistance of counsel in his revocation proceeding. After the parties briefed the matter, this Court appointed counsel for Redmond and ordered supplemental briefing. The Court asked the parties to address the respondent's argument that a motion to reopen before the administrative body is an adequate and available remedy. The Court asked the parties to address whether there is any established mechanism for a post-revocation motion for relief before the Administrative Law Judge (ALJ) or the Division of Hearings and Appeals (DHA). The Court also asked about the standard under which the motion for relief would be addressed. The respondent addresses these questions herein and also addresses other arguments raised by Redmond's counsel.

1. Under Wisconsin law, to obtain habeas relief a petitioner must show that there is no other adequate remedy available in the law. Redmond could raise his claims of ineffective assistance of revocation counsel in a motion to the DHA Administrator to reopen the case pursuant to *State ex rel. Booker v. Schwarz*. Did the circuit court properly dismiss Redmond's habeas petition because he had an adequate and available remedy?

   The circuit court answered: Yes.

   This Court should answer: Yes.

2. In *State ex rel. Booker v. Schwarz*, this Court concluded that a post-revocation motion to the DHA

Administrator shall be governed by procedures analogous to those in criminal cases. When a criminal defendant raises a colorable claim for ineffective assistance of counsel in a post-conviction motion, the matter may be set for an evidentiary hearing called a *Machner* hearing. Would an analogous procedure apply in the civil revocation context, taking into consideration the obvious differences between criminal and administrative hearings?

Not answered by the circuit court.

This Court should answer: Yes.

ARGUMENT

I. This Court should affirm the circuit court's dismissal of Redmond's petition for a writ of habeas corpus because Redmond had an adequate remedy available at law.

A. Habeas relief is barred unless the party seeking habeas relief shows the lack of adequate remedies available at law.

If there is an adequate remedy available in the law, "habeas corpus is not available to the petitioner." *State ex rel. Krieger v. Borgen*, 2004 WI App 163, ¶ 5, 276 Wis. 2d 96, 687 N.W.2d 79. In *Krieger*, this Court determined that habeas relief was properly denied "because [the petitioner] cannot show that he pursued other remedies available to him in the law." *Id*. ¶ 13.

Redmond contends that he can proceed by habeas based on his allegation that his revocation attorney was

ineffective. But Redmond has other adequate and available remedies, which preclude habeas relief.

B. Redmond's ineffective assistance of counsel claim could have been raised through a *Booker* motion.

In 1984, this Court held that a claim of ineffective assistance of revocation counsel could be raised through habeas rather than certiorari because additional evidence was needed. *State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). At the time, there was no recognized method by which a probationer could move to re-open a revocation hearing at the administrative level to put on further evidence.

This has since changed. In 2004, this Court determined that offenders could file a motion to re-open revocation hearings on the basis of newly discovered evidence. *See State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361. In *Booker*, an offender's probation was revoked through an ALJ decision, which was later affirmed by the DHA Administrator. *Id.* ¶ 4. The *Booker* court held that an offender whose probation or parole was revoked has a right to move the DHA Administrator to reopen the revocation case. *Id.* ¶¶ 1–20.

Booker was based on the concept that it would be unjust to allow criminal defendants to pursue post-trial motions based on newly discovered evidence while persons whose probation or parole was revoked could not pursue similar post-revocation motions. Accordingly, despite the

lack of authority expressly allowing the Administrator to re-open revocation proceedings, justice and due process required the Administrator to consider newly discovered evidence in the revocation proceeding. *Booker*, 270 Wis. 2d 745, ¶¶ 9–14.

Under this logic, revoked offenders may also direct post-revocation motions to the Administrator requesting relief based on ineffective assistance of counsel. The Administrator and the ALJ are the equivalent of the trial court in a criminal matter. Criminal defendants who wish to claim ineffective assistance of counsel do so through a post-conviction motion directed to the trial court. *See e.g. State v. Carter*, 2010 WI 40, ¶ 1, 324 Wis. 2d 640, 782 N.W.2d 695. If the allegations are sufficient to warrant it, they are then given a *Machner* hearing to put on evidence of counsel's alleged deficiencies. *Id.* ¶ 16. With the creation of the *Booker* motion remedy, which provides the opportunity to introduce additional evidence at the administrative level, probationers who allege ineffective assistance of revocation counsel are now analogous to criminal defendants on this issue.

C. Redmond's arguments are unfounded.

In his supplemental brief, Redmond argues that *Ramey*, and cases that rely on *Ramey*, prevent this Court from holding that a Booker motion is an adequate and available remedy for offenders seeking to challenge the effectiveness of their revocation counsel.

(Pet'r-Appellant Br. 6–7.) But *Ramey* held only that habeas corpus, not certiorari, is the appropriate remedy when there is no other remedy available. *Ramey*, 121 Wis. 2d at 182. *Ramey* is still good law on that point.

Now, however, there *is* an alternative remedy—a *Booker* motion. As a factual matter, offenders can now file a post-revocation motion with the Administrator requesting relief based on ineffective assistance of counsel. Redmond does not dispute that habeas is available only when there is no other adequate remedy at law. (Pet'r-Appellant Br. 2–3.) If a *Booker* motion were to become unavailable and there were no other remedies at law, then habeas would once again be the appropriate remedy in this context.

Redmond concedes that the DHA is in the best position to determine whether newly discovered evidence merits a new revocation hearing. (Pet'r-Appellant Br. 7–8.) So too is the DHA a far better forum for presenting a claim of ineffective assistance of revocation counsel. The DHA Administrator has the full record to evaluate the claim and is more familiar with the facts of the revocation proceeding to assess prejudice. The circuit court, in contrast, has no familiarity with the facts of the case and is not uniquely positioned to evaluate such a claim.

D. At least two circuit courts have concluded that a *Booker* motion is an adequate and available remedy for a claim of ineffective assistance of revocation counsel.

No reported Wisconsin decision has addressed applying the *Booker* motion to an ineffective assistance claim. But at least two circuit court decisions have. In *State ex rel. Martinez v. Hayes*, the Washington County Circuit Court concluded that the *Booker* motion was an adequate and available remedy for a claim of ineffective assistance of revocation counsel. *Martinez*, No. 14-CV-594, at 3–4 (Wis. Cir. Ct. Washington Cty. July 6, 2015). The Milwaukee County Circuit Court reached the same conclusion in *State ex rel. Johnson v. Kemper*, No. 15-CV-2277 (Wis. Cir. Ct. Milwaukee Cty. June 26, 2015 and Sept. 18, 2015).[1]

In *Martinez*, the petitioner sought habeas relief from the revocation of his extended supervision, in part, based upon ineffective assistance of counsel. *Martinez*, No. 14-CV-594, at 2. The respondent argued that the petitioner had a right to seek the relief he requested via a *Booker* motion and, therefore, the petitioner could not show that he had no other remedy available to him apart from habeas corpus. *Id.* The circuit court agreed. *Id.* at 3–4.

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[1] Copies of these decisions are included in the respondent-respondent's appendix at pages 1 through 12. *Martinez* is currently pending on appeal. *See State ex rel. Martinez v. Hayes*, No. 2014AP2095. Another case addressing the *Booker* issue is also pending before this Court. *See State ex rel. Hollins v. Pollard*, No. 2015AP1653.

The *Martinez* court concluded that "the *Booker* Court's determination that an individual whose probation or parole is revoked may move the administrator for a new hearing is applicable to the present case." *Martinez*, No. 14-CV-594, at 3. The court reasoned that "[j]ust as the law allows one convicted of a crime to pursue through the courts a due process right to relief based on ineffective assistance of counsel, that right should be available to a probationer on post-revocation claims of ineffective assistance by an appeal to the administrator." *Id*. at 4. The *Martinez* court found that this position was a logical extension of *Booker*. This Court should conclude the same.

E. The *Booker* motion is an adequate and available remedy for Redmond.

After *Booker*, a petitioner pursuing habeas relief based on alleged ineffective assistance of revocation counsel cannot demonstrate that he has no adequate remedy at law. *Booker* signals that filing a motion with the Administrator is a far better forum for presenting an ineffective assistance of revocation counsel claim than filing a habeas case in circuit court. The Administrator is in the best position to assess whether a motion states sufficient grounds to justify an evidentiary hearing, already has the full record to evaluate the claim, and is more familiar with the facts of the revocation proceeding. In turn, if an evidentiary hearing is warranted, the evidence can be heard by the original tribunal, an ALJ. The offender could then challenge the

Administrator's decision on the *Booker* motion through certiorari review, if he so desired. *See Booker*, 270 Wis. 2d 745, ¶ 1.

In his circuit court briefing, Redmond claimed that he contacted the DHA Administrator and requested a new revocation hearing based on newly discovered evidence. (R 21:23–24; 22:3–4.) The "newly discovered" evidence—that Astoria Thomas recanted her version of the incident—was previously presented to the ALJ and the DHA Administrator. (R. 22:3–4.) Redmond did not raise ineffective assistance of counsel in his request to the DHA Administrator. (R. 22:3–4.) The DHA Administrator analyzed Redmond's request using the five-prong test outlined in *Booker* and concluded that Redmond was not entitled to a new hearing. (R. 22:3–4.) Redmond did not seek certiorari review of this decision.

In summary, Redmond filed a *Booker* motion with the DHA Administrator based on allegedly newly discovered evidence, but that motion was appropriately denied and Redmond did not seek certiorari review. (R. 22:3–4.) Redmond does not allege that he filed a *Booker* motion based on ineffective assistance of counsel. (R. 21:23–24; 22:3–4.) Thus, Redmond has failed to demonstrate that he had no adequate and available remedies and, for that reason, the circuit court properly dismissed Redmond's habeas petition.

II. A motion to the DHA Administrator claiming ineffective assistance of revocation counsel should follow analogous procedures to those in criminal cases, taking into consideration the obvious differences between criminal and administrative proceedings.

A *Booker* motion is the established mechanism for a post-revocation motion for relief before the DHA. *Booker*, 270 Wis. 2d 745, ¶ 13. As discussed above, this mechanism is also appropriate for claims of ineffective assistance of revocation counsel. This Court has asked the parties to address the standard under which such a motion for relief should be addressed. The *Booker* court concluded that "whether a claim that newly discovered evidence entitles a probation revokee to an evidentiary hearing to determine whether a new probation revocation hearing should be conducted shall be governed by procedures analogous to those in criminal cases." *Id*. ¶ 14. This Court should follow the same standard here.

A. The equitable doctrine of laches applies to a post-revocation motion to the DHA Administrator.

This Court has asked whether any time limits would apply in bringing a post-revocation motion to the DHA Administrator. There are no set time limits for such a motion. As such, the equitable doctrine of laches applies.

In *Booker*, Booker filed his post-revocation motion six years after his probation was revoked. *Booker*, 270 Wis. 2d 745, ¶¶ 4–5. The *Booker* court noted that the doctrine of

laches applied to Booker's post-revocation motion and that the doctrine could be considered at the evidentiary hearing on Booker's claim of newly discovered evidence. *Id*. ¶ 20 n.2.

When no time limit is prescribed by law, the equitable doctrine of laches applies. *See Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶ 11, 246 Wis. 2d 385, 630 N.W.2d 772. The supreme court has recognized laches as an available defense to a habeas petition alleging ineffective assistance of counsel. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 17, 290 Wis. 2d 352, 714 N.W.2d 900.

The doctrine of laches is satisfied when there is "(1) an unreasonable delay by the party seeking relief; (2) a lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay." *Zizzo v. Lakeside Steel & Mfg. Co.,* 2008 WI App 69, ¶ 7, 312 Wis. 2d 463, 752 N.W.2d 889.

There is no set time limit for a post-revocation motion to the DHA Administrator. Therefore, the doctrine of laches applies.

B. A motion to the DHA Administrator claiming ineffective assistance of revocation counsel must plead sufficient factual allegations requiring resolution by an evidentiary hearing.

The *Booker* court concluded that the pleading requirements for a request for a new revocation hearing based on newly discovered evidence is the same as the

pleading requirements for a request for a new trial based on newly discovered evidence. *Booker*, 270 Wis. 2d 745, ¶ 15. It follows that the pleading requirements for a motion to the DHA Administrator claiming ineffective assistance of revocation counsel should also follow the procedures applicable in criminal proceedings.

When a post-conviction motion raises an ineffective assistance of counsel claim, the matter may be set for an evidentiary hearing known as a *Machner* hearing. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). But the court "has the discretion to deny the postconviction motion without a *Machner* hearing 'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" *State v. Roberson,* 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111 (quoting *State v. Curtis,* 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998)). Within the context of an ineffective assistance of counsel claim, this consists of alleging facts which, if true, show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). These same pleading standards should be applied to a motion to the DHA Administrator claiming ineffective assistance of revocation counsel.

C. If the offender pleads sufficient facts, the DHA should hold a *Machner* hearing on the ineffective assistance of counsel claim.

When a defendant makes a colorable claim for ineffective assistance of counsel, the circuit court holds a *Machner* hearing. *State v. Balliette*, 2011 WI 79, ¶ 94, 336 Wis. 2d 358, 805 N.W.2d 334. The same standard should apply here, except that the Court should account for the obvious differences between criminal and administrative proceedings.

In the criminal context, a *Machner* hearing is critical to address the competency of defense counsel and to preserve a defense counsel's testimony. *Machner*, 92 Wis. 2d at 804. Otherwise, the court cannot determine whether counsel's actions were "the result of incompetence or deliberate trial strategies." *Id.* The hearing is important to give counsel a chance to explain his or her actions, and to "allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion." *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). Similar procedures should apply in the civil revocation context.

When a post-revocation motion adequately raises an ineffective assistance of counsel claim, the matter should be set for an evidentiary hearing. This hearing may be delegated to the ALJ who heard the revocation because he or she is in the best position to evaluate revocation counsel's performance. While the hearing is a *Machner*-type hearing,

it is held in the context of a revocation hearing, which is a civil matter governed by administrative rules.

The technical rules of evidence are inapplicable to revocation proceedings. Wis. Stat. § 911.01(4)(c); *State ex rel. Prellwitz v. Schmidt*, 73 Wis. 2d 35, 40 n.2, 242 N.W.2d 227 (1976); *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549, 185 N.W.2d 306 (1971). The full range of rights afforded defendants in criminal prosecutions do not extend to defendants in revocation proceedings. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Accordingly, it makes sense that the same rules that apply in revocation proceedings should also apply in an evidentiary hearing to determine whether an offender is entitled to a new revocation hearing due to ineffective assistance of revocation counsel.

D. The offender may seek certiorari review of an adverse decision.

If the DHA Administrator denies the post-revocation motion on the pleadings or if the DHA denies a new revocation hearing following a *Machner* hearing, such decisions can be reviewed via a petition for a writ of certiorari.

Denials by the Administrator of *Booker* motions may be challenged through certiorari review. *Booker*, 270 Wis. 2d 745, ¶ 1. Similarly, an unfavorable decision at the *Machner* hearing before the ALJ could be appealed to the DHA Administrator, and then challenged through certiorari review. *See* Wis. Admin. Code § HA 2.05(8). It is

well-established that, where there are no statutory provisions for judicial review, the actions of a board or commission may be reviewed by certiorari. *Johnson*, 50 Wis. 2d at 549–50. While certiorari is not available to challenge ineffective assistance of revocation counsel in the first instance, *Ramey*, 121 Wis. 2d at 182, it is appropriate once there is an administrative record on this issue to review. Accordingly, certiorari is the appropriate mechanism for review of these decisions.

CONCLUSION

This Court should affirm the circuit court's decision.

Dated this 9th day of February, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3049 words.

Dated this 9th day of February, 2016.

s/Karla Z. Keckhaver
KARLA Z. KECKHAVER
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of February, 2016.

s/Karla Z. Keckhaver
KARLA Z. KECKHAVER
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of February, 2016.

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